(508)

Motion to Set Aside Verdict and for New Trial and Oral Opinion

New York, December 10, 1958
1:00 o'clock p.m.

Mr. Ticktin: At the outset, may it please the Court, may I ask for waiver of written notice of motion and of service thereof, pursuant to Rule 59 of the Rules of Civil Procedure?

Mr. Reilly: We so concede or stipulate.

The Court: All right, let us get on.

Mr. Ticktin: This is a motion, may it please the Court, pursuant to Rule 59 of the Rules of Civil (509) Procedure for a new trial upon the ground that the verdict is contrary to the law, contrary to the evidence, contrary to the weight of the evidence, and on all the exceptions taken during the course of the trial, and on the failure of the Court to charge the jury as requested by the plaintiff.

The motion is likewise made, may it please the Court, to set aside the verdict and for a new trial on the ground that the verdict is inadequate. I take it your Honor knows as well as I that the Court has the power to grant such a motion.

The Court: Yes.

Mr. Ticktin: The basis for the motion to set aside the verdict is on the ground that it is grossly inadequate, that from the small amount rendered in behalf of the widow and the infant—particularly the widow, which was in the amount of $15,000, the jurors must have attempted to enforce some punitive measure

against the deceased, against his surviving widow. It is incredible that such a low verdict in a death action of a man of the age of 46 could have been rendered were it not for some influence or reaction that is not apparent to me. It is wholly incredible that the jurors could bring in such a verdict without disregarding the (510) fact that we are dealing with the death of a human being who had a considerable potential, and particularly based on the unequivocal statement of his widow, the plaintiff, that he had ceased drinking, which in fact was confirmed by the record of the Towns Hospital, which of course I had never seen prior to a few minutes before its introduction into evidence.

Of course I had never seen it prior to its introduction except for a few minutes. I venture the suggestion, may it please the Court, that the verdict must have necessarily shocked the conscience of the Court by virtue of its minuteness, its inadequacy.

We contend that this is a case of gross miscarriage of justice, and that under such circumstances the only alternative of the Court is to grant a new trial in order to avoid an injustice. Certainly as we view it, based on the lowest figure of life expectancy which your Honor charged the jury, which I believe was about 22 years, the net verdict, excluding the funeral expense element, based on the four percent annuity payable, would produce for the widow approximately $900 a year. That is my computation—I may be in error about it.

I call your Honor's attention to this salient (511) fact, too, that the $15,000 verdict which inured to the

widow included some $1750 or $1775—I have the exact amount——

The Court: Well, it is seventeen hundred-odd.

Mr. Ticktin: Yes, funeral expenses. So the verdict, really, the compensatory verdict to her was about $13,250.

I call your Honor's attention to the fact also that your Honor charged in connection with the testimony of Stoller, wherein he was asked certain questions concerning some prior contradictory statements alleged to be made to Brady, an agent of the Federal Bureau of Investigation, and the answer was consistently no, your Honor will recall——

The Court: Oh, I recall it vividly. Go ahead.

Mr. Ticktin: And your Honor charged the jury in that connection that—and I think your Honor did give the jury the impression that it was reasonable to assume that if Brady were not produced here, the statements were not made.

I am attempting to paraphrase your Honor's charge in that connection—but then your Honor proceeded further and stated that it was for the jury, notwithstanding, to determine the truth or the accuracy of that (512) fact. I think in that instance, your Honor, that you fell into error, if I may respectfully suggest it, and I refer your Honor to the case of Rogge v. Valentine, 280 NY 268, at page 276, where the Court of Appeals of New York stated—and may I quote, your Honor: "The rule has long been established that a prior contradictory statement, whether made in court under oath or outside of court orally or in writing, may in proper case be introduced

MICROCARD

TRADE MARK ®

22

MATTHEW BENDER & COMPANY

MB

-60

CD199

to impeach the credibility of the witness, but do not constitute affirmative evidence or 'evidence in chief' of the facts stated"—citing McCabe v. Bretton, 38 NY 196 and Gratton v. Metropolitan Life Insurance Co., 92 NY 274: "It is universally maintained by the courts that prior self-contradictions are not to be treated as having any substantive or independent testimonial value" (2 Wigmore on Evidence, 2nd ed. 1018) "No sufficient reason appears why the Court should reconsider now the rule of evidence formally established by the courts."

I contend, your Honor, that even if Mr. Brady had been produced and had testified to prior contradictory statements made by the witness Stoller, it would still be no question for the jury to determine (513) because that would not have presented any evidence, affirmative evidence of the question.

I have these few items to discuss with your Honor, and I will be through in a moment.

Your Honor, failed to advise the jury that the damage should have been computed as of 1949. I think your Honor intended to do that during the course of one of our off-the-record discussions. I think your Honor did so indicate but apparently your Honor forgot so to do. I think the jury should have been apprised of that. The jury may very well have assumed that since almost ten years have elapsed from the time of the accident that they could very well deduct that elapsed period from their consideration from the 22 years of probable life expectancy, which is the lowest figure that your Honor charged.

Motion to Set Aside Verdict and for New Trial and Oral Opinion

In the interests of justice I will withdraw that last statement. Your Honor very well knows what verdicts juries have rendered in ordinary simple accident cases, and in death cases, and I think this figure of $15,000, your Honor, sets an entirely new—and I say a new low on verdicts in death actions.

The Court: Is that the end of your motion?

Mr. Ticktin: In the interests of justice, (514) your Honor, the motion to set aside the verdict, particularly on the ground of inadequacy, the motion for a new trial on the ground of an evident miscarriage of justice, should be granted.

The Court: Mr. Ticktin, while I might personally disagree with the quantum of the damages had I been trying the case, I must say that in view of the fact of the man's condition of health, which was brought out to the jury, and his meagre earnings, I cannot say that the verdict was so grossly inadequate that it shocks my conscience, and your motion to set aside the verdict on the ground that it is inadequate is denied, and the other errors that you press do not impress me, and your other motions are also denied, with exceptions on both scores.

* * *

Opinion of the Court of Appeals

(335a)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 273 October Term, 1959.

(Argued April 5, 1960 Decided June 2, 1960.)

Docket No. 25565

JOSEPHINE A. ST. CLAIR, as Executrix of the Estate of Harold W. St. Clair, deceased,

Plaintiff-Appellant,

—v.—

EASTERN AIR LINES, INC.,

Defendant-Appellee.

Before: LUMBARD, *Chief Judge*,

HINCKS and FRIENDLY, *Circuit Judges*.

Plaintiff appeals from a judgment in her favor for $24,000 entered by the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, upon a jury verdict in an action for wrongful death. Plaintiff claimed that the verdict was grossly inadequate and that numerous errors were committed in the admission of evidence and in the charge of the court.

Reversed and remanded.

Opinion of the Court of Appeals

(336a)

DAVID A. TICKTIN, New York, N. Y. (Powers, Kaplan & Berger, New York, N. Y., on the brief), *for plaintiff-appellant.*

JOHN G. REILLY, New York, N. Y. (Robert F. Ewald and Bigham, Englar, Jones & Houston, New York, N. Y., on the brief), *for defendant-appellee.*

LUMBARD, *Chief Judge*:

Josephine St. Clair, widow of Harold St. Clair and executrix of his estate, appeals from a jury verdict in her favor in an action for damages for the wrongful death of Mr. St. Clair, allegedly caused by the negligence of Eastern Air Lines. The plaintiff's decedent was killed on November 1, 1949, when an Eastern Air Lines DC-4 in which he was a passenger collided in mid-air with a Bolivian plane as the DC-4 approached Washington National Airport for a landing. Eastern's liability under the law of the District of Columbia for the decedent's death was established in a suit brought by the estate of another passenger killed in the same accident, by which determination the parties agreed to be bound.[1] The sole matter at issue in this litigation was therefore the amount of the damages to be awarded the appellant under the District of Columbia Wrongful Death Act, D. C. Code §16-1201, which per-

[1] *See Union Trust Co. v. United States*, 113 F. Supp. 80 (D. D. C. 1953), modified, 224 F. 2d 62 (D. C. Cir.), defendant's appeal affirmed, 350 U. S. 907, plaintiffs' appeal cert. denied, 350 U. S. 911 (1955); *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F. 2d 62 (D. C. Cir.), reversed, 350 U. S. 907 (1955), modified and remanded on rehearing, 350 U. S. 962, on remand, 239 F. 2d 25 (D. C. Cir. 1956), cert. denied, 353 U. S. 942 (1957).

mits recovery only for funeral expenses and the pecuniary loss suffered by the spouse and next of kin. The plaintiff sought (337a) damages of $350,000 and the jury returned a verdict for $24,000, of which $15,000 was allocated to the plaintiff and the balance to decedent's minor child by an earlier marriage.

Plaintiff assigns numerous errors in the admission of evidence and in the trial court's charge to the jury and asserts also that the verdict should be set aside as grossly inadequate. Because we conclude that the trial court was in error in admitting considerable testimony irrelevant to the decedent's prospective earning ability, and the plaintiff's consequent pecuniary loss, and that this evidence may well have influenced the jury's verdict, we reverse the judgment and remand the case for a new trial.

At the trial defense counsel cross-examined the plaintiff at length concerning the circumstances of the initial acquaintanceship between the plaintiff and her deceased husband, plaintiff's knowledge at the time she began seeing him that he was then married to another woman, her familiarity with the progress of the divorce suit brought by his prior wife, and whether the decedent had been living at the plaintiff's apartment prior to their marriage. This testimony was admitted by the trial court, over the objections of plaintiff's counsel, on the theory that it was evidence of decedent's character and that his personal qualities and habits were proper considerations in determining his business capacity, the amount of support that he would contribute to his family, and the likelihood of his financial advancement. We think that the testimony was irrelevant to the question of the pecuniary

loss suffered by the plaintiff and by the decedent's child and should not have been admitted.

Undoubtedly personal habits and qualities are to some degree relevant considerations in determining an individual's earning ability and the support that his family would (338a) have received from him but for his death. Thus, courts have held in wrongful death actions under statutes similar to that of the District of Columbia that it was proper to show that a decedent had been undergoing treatment for mental illness immediately before his death, *Eder* v. *Cashin*, 281 App. Div. 456, 120 N. Y. S. 2d 165 (1953), or that he engaged in greatly excessive drinking, *McIlwaine* v. *Metropolitan Street Railway Co.*, 74 App. Div. 497, 77 N. Y. Supp. 426 (1902). Such evidence is relevant because the trier of fact may reasonably think that these traits affect the individual's ability to keep and maintain employment; it also bears on the likelihood that his funds will be used for the benefit of his family rather than be expended in other ways. For the same reason, it would probably be appropriate, for example, to receive evidence that a deceased had a reputation among his business associates or employers for dishonesty or irresponsibility. See Annot., 163 A. L. R. 258.

That some aspects of a decedent's character may properly be shown in determining the damages to be awarded in a wrongful death action does not mean, however, that all his habits and qualities are relevant. See, e. g., *Lipscomb* v. *Houston & T. C. R. Co.*, 95 Tex. 5, 10, 64 S. W. 923, 927 (1901). The defendant should not be permitted to put in evidence anything he may unearth which reflects unfavorably upon the decedent. Except as they may show a propensity of the decedent

to spend his income in ways which do not inure to the benefit of his family, the details of his personal life are not in issue and, in the present case, the history of St. Clair's relationship with the plaintiff bore no relation to any matter which was in issue. The manner in which men choose to conduct their personal lives very often has little bearing on the way that they manage their business affairs. In the absence of some preliminary showing to the contrary, a court ought not to (339a) suppose that evidence of the former is of utility in determining the latter. Moreover, in the case before us, any remote evidentiary value that the details of the decedent's personal life may have had was far outweighed by the certainty that prejudice to the plaintiff's case in the minds of the jurors would result from the introduction of evidence showing in an ill light not only the decedent but the plaintiff as well.

Plaintiff also urges that it was error for the trial court to permit appellee's counsel to read to the jury certain extracts from the deposition of one Stoller. Stoller had been a business associate of the decedent. In his deposition on direct examination by the appelee he testified repeatedly and unequivocally that he never had seen the decedent drinking on the job or indeed under the influence of alcohol in 1949. On cross-examination by Mr. Clark, an assistant United States Attorney, in behalf of the United States which was then a party to the action, Stoller admitted that he recalled having been interviewed by one Brady of the Federal Bureau of Investigation. But when repeatedly asked if he had not told Brady that on business occasions he had seen the defendant when unable to sign checks because of his alcoholic condi-

tion and that the decedent had left his employment because he may have been an alcoholic, the witness consistently denied having made such statements to Brady. Thus the deposition laid a preliminary foundation for a contradiction of Stoller's deposition testimony, if that should be offered at trial, by calling Brady at the trial to testify to the inconsistent out-of-court statements which Stoller, on deposition had been confronted with and had denied.

At the trial the appellant read portions of Stoller's examination on deposition by counsel then representing the defendant and by Clark. Appellee's trial counsel was then allowed over objection to read into the record in the (340a) presence of the jury portions of Stoller's deposition containing Clark's questions purportedly reciting these inconsistent statements given to Brady. By this indirect technique, counsel succeeded in putting before the jury subject-matter of questions, prejudicial to the plaintiff's case, the only legitimate purpose of which was to lay the foundation for contradiction by Brady. But counsel never called Brady nor was there put into the trial record a shred of evidence to show that the deponent Stoller had ever made out-of-court statements inconsistent with his deposition testimony.

It is unfortunate that the trial judge, when appellee's counsel sought to read to the jury Clark's questions, failed to inquire, as he doubtless would have done if requested by appellant's counsel, whether he (appellee's counsel) intended to proffer Brady as an impeaching witness. Upon a negative answer to such an inquiry, it would have been clearly erroneous to permit the reading of Clark's deposition questions.

People v. *Sanders*, 192 N. E. 697, 702 (Ill.); *Horton* v. *Mozin*, 92 N. E. 691 (Ill.). Cf. *Kesten* v. *Forbes*, 273 App. Div. 646, 78 N. Y. S. 2d 769. *Miller* v. *Henderson*, 124 A. 2d 23 (N. J. Superior Court), is not to the contrary. It was there held that *on trial* a party was entitled to cross-examine a witness as to an out-of-court statement notwithstanding counsel's refusal to represent that in the event the witness denied making the statement competent proof thereof would be offered. The situation was such that counsel could hope to develop answers by the witness or demeanor conduct likely to have an impeaching effect. But in this case that objective was served not at all by reading *from the deposition* Clark's questions and Stoller's answers: it was plain that the questions were harmful in their content to the plaintiff's case and that the answers given, without Brady's testimony in contradiction of the deponent, had not the slightest tendency to impeach.

(341a)

It would, of course, have been improper for appellee's counsel to have read the questions for the purpose of putting their prejudicial content before the jury with no intent to make use of the foundation thus laid by calling Brady. 98 C. J. S. §§597, 594. But on this record such misconduct may not be attributed to counsel: for aught that appears, counsel at that stage of the trial may have intended to offer Brady. Nevertheless, it is plain that the content of the questions was prejudicial: It was error to permit them to be read without assurance that they were needed as necessary foundation for contradicting testimony by Brady.

PAGE

Keston v. *Forbes*, 273 App. Div. 646; 78 N. Y. S. 2d 769 44

Lipcomb v. *Houston & T. C. R. Co.*, 95 Tex. 5, 64 S. W. 923 (1901) 38

Lockwood v. *New York, L. E. & W. R. Co.*, 98 N. Y. 523 32

Miller v. *Henderson*, 124 A. 2d 23 (N. J. Superior Court) 44

Norfolk & Western Railway Co., 235 U. S. 625 (1915) 29

O'Connor v. *U. S.*, 269 F. 2d 578 (2 Cir. 1959) .. 33

People v. *Ferraro*, 293 N. Y. 51 (1944) 42

People v. *Sanders*, 192 N. E. 696 (Illinois) 43

Philadelphia & R. R. Co. v. *Baker*, 155 Fed. 407 (3 Cir. 1907), affirming 149 Fed. 882 33

Philadelphia & R. Ry. Co. v. *Bartsch*, 9 Fed. 2d 858 (3rd Cir.) 43, 44

Railroad Company v. *Barron*, 72 U. S. 90 (1866) 30

Rankin v. *Shayne*, 234 F. 2d 35 (App. D. C. 1956) 32

St. Louis & S. F. R. Co. v. *Duke*, 192 Fed. 306 (8 Cir. 1911), affirming 172 Fed. 684 34

Southern Pac. Co. v. *Lafferty*, 57 Fed. 536 (9 Cir. 1893) 34

Speich v. *Cromley*, 94 F. 2d 543 (3 Cir. 1938), affirming 19 F. Supp. 857 33

Stafford v. *Roadway Transit Co.*, 165 F. 2d 920 (3 Cir. 1948), affirming 73 F. Supp. 458 and 70 F. Supp. 555 33

Tate v. *Nelson*, 71 F. Supp. 465 (D. D. C. 1947) .. 27

The Voland, 181 Fed. 643 (2 Cir. 1910) 33

PAGE

Union Trust Co. v. *U. S.*, 113 F. Supp. 80 (D. D. C. 1953), modified 221 F. 2d 62 (D. C. Cir.), defendant's appeal affirmed, 350 U. S. 907, plaintiff's appeal cert. denied, 350 U. S. 911 (1955) 2, 6, 35

United States v. *Angelo*, 153 Fed. 2d 247 (3rd Cir. 1946) 44

United States v. *Brooks*, 176 F. 2d 482 (4 Cir. 1949) 33

United States Electric Lighting Co. v. *Sullivan*, 22 App. D. C. 115 (1903) 30, 31

STATUTES

District of Columbia Code 16-1201 ..... 4, 5

District of Columbia Code 16-1203 5

F. R. C. P. 43 41

28 U. S. C. 1254 (1) 3

28 U. S. C. 1332 6

Philadelphia & R. Ry. Co. v. *Bartsch*, 3 Cir., 9 F. 2d 858, 861.

Nor was the resulting harm cured by the charge. The judge not only refused to charge that a witness's prior inconsistent statement was not to be considered as substantial evidence of the facts stated therein,[2] but he told the jury that whether or not Stoller had made an inconsistent statement to an F.B.I. agent "is entirely up to you and within your sole and exclusive province." This was erroneous. If, as indeed the judge told the jury, there was no evidence of an inconsistent statement, surely it was not for the jury to find that one had been made. And the error of such an instruction was not cured by the judge's accompanying observation that the failure to produce the F.B.I. agent was important for its corroborating effect in lending credibility to Stoller's denial of an inconsistent statement. This, doubtless, was somewhat helpful to the plaintiff's case. But only an instruction to take Stoller's deposition testimony as wholly uncontradicted would have sufficed. Cf. *Behrman* v. *Sims*, D. C. Cir., 157 F. 2d 862.

(342a)

We conclude that the error in permitting the reading of Clark's questions, and in the related charge and the refusal to charge, were in themselves sufficiently prejudicial to require reversal. Because of these errors and those discussed earlier, the case is

Reversed and remanded.

---

[2] *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161; *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co., Inc.*, 2 Cir., 185 F. 2d 285; *People* v. *Ferraro*, 293 N. Y. 51, 55 N. E. 2d 861; *Rogo* v. *Valentine*, 280 N. Y. 268, 20 N. E. 2d 751.

(343a)

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of June, one thousand nine hundred and sixty.

Present: HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. CARROLL C. HINCKS,
HON. HENRY J. FRIENDLY, *Circuit Judges*.

JOSEPHINE A. ST. CLAIR as Executrix of the Estate of Harold W. St. Clair, deceased,
Plaintiff-Appellant

v.

EASTERN AIR LINES, INC.,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgement of said District Court be and it hereby is reversed and the action be and it hereby is remanded in accordance with the opinion of this court, with costs to the appellant.

A. DANIEL FUSARO,
Clerk

Philadelphia & R. Ry. Co. v. *Bartsch*, 3 Cir., 9 F. 2d 858, 861.

Nor was the resulting harm cured by the charge. The judge not only refused to charge that a witness's prior inconsistent statement was not to be considered as substantial evidence of the facts stated therein,[2] but he told the jury that whether or not Stoller had made an inconsistent statement to an F.B.I. agent "is entirely up to you and within your sole and exclusive province." This was erroneous. If, as indeed the judge told the jury, there was no evidence of an inconsistent statement, surely it was not for the jury to find that one had been made. And the error of such an instruction was not cured by the judge's accompanying observation that the failure to produce the F.B.I. agent was important for its corroborating effect in lending credibility to Stoller's denial of an inconsistent statement. This, doubtless, was somewhat helpful to the plaintiff's case. But only an instruction to take Stoller's deposition testimony as wholly uncontradicted would have sufficed. Cf. *Behrman* v. *Sims*, D. C. Cir., 157 F. 2d 862.

(342a)

We conclude that the error in permitting the reading of Clark's questions, and in the related charge and the refusal to charge, were in themselves sufficiently prejudicial to require reversal. Because of these errors and those discussed earlier, the case is

Reversed and remanded.

---

[2] *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161; *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co., Inc.*, 2 Cir., 185 F. 2d 285; *People* v. *Ferraro*, 293 N. Y. 51, 55 N. E. 2d 861; *Rogo* v. *Valentine*, 280 N. Y. 268, 20 N. E. 2d 751.

(343a)

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of June, one thousand nine hundred and sixty.

Present: HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. CARROLL C. HINCKS,
HON. HENRY J. FRIENDLY, *Circuit Judges*.

JOSEPHINE A. ST. CLAIR as Executrix of the Estate of Harold W. St. Clair, deceased,
Plaintiff-Appellant

v.

EASTERN AIR LINES, INC.,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgement of said District Court be and it hereby is reversed and the action be and it hereby is remanded in accordance with the opinion of this court, with costs to the appellant.

A. DANIEL FUSARO,
Clerk